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Supreme Court, U.S.
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In the Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,

v.

JOHN DOE,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF AMICI CURIAE AMERICAN ASSOCIATION OF COMMUNITY COLLEGES, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AMERICAN COUNCIL ON EDUCATION, ASSOCIATION OF AMERICAN UNIVERSITIES, ASSOCIATION OF JESUIT COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI*[1]

Amici are national associations that represent public and independent primary, secondary, and higher education institutions and the educators who serve them. *Amici* believe that finding a private right of action under 42 U.S.C. § 1983 ("§ 1983") to adjudicate individual's claims arising under The Family Educational Rights and Privacy Act of 1974 ("FERPA") will disrupt a national system of education record administration which has been constructed in response to Congressional funding initiatives. *Amici* also believe that the enormous scope of FERPA means that recognition of a private right of action under § 1983 in association with practices and policies responsive to Congressional funding conditions will bring state and federal courts into virtually all facets of American education. Finally, the *amici* are concerned that the Court be fully aware of the numbers of parallel and/or similar federal statutes which fund education programs that will also be affected by a precedent set with regard to § 1983's applicability to FERPA.

Amicus, the American Association of Community Colleges ("AACC") is the primary advocacy organization for the nation's 1,100 two-year, degree-granting institutions. Organized in 1920, AACC promotes the causes of its member colleges through: legislative advocacy; monitoring of national issues and trends; collection, analysis, and dissemination of information; representation with other

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. This brief is submitted with the consent of all of the parties and letters of consent from counsel for the parties have been filed with the Clerk.

educational agencies and the national media; and research and publication of news and scholarly analysis.

The American Association of State Colleges and Universities ("AASCU") is a leading higher education association that represents more than 400 state colleges and universities across the United States and in Puerto Rico, Guam, and the Virgin Islands. Formed in 1961, AASCU monitors higher education policies at the national and state level and serves as a forum for examining and acting upon higher education issues. AASCU believes that public colleges and universities have a special role in our society – that of providing educational opportunity to everyone, regardless of economic condition, age, sex, or ethnic background.

Amicus American Council on Education ("ACE") represents all sectors of American higher education. Its approximately 1,800 members include a substantial majority of colleges and universities in the United States. Since its founding in 1918, ACE has sought to promote high standards in higher education, in the belief that a strong higher education system is the cornerstone of a democratic society. ACE's initiatives address issues of national importance, ranging from higher education quality and affordability to the responsiveness in other respects of colleges and universities to the nation's needs.

Founded in 1900, *amicus*, the Association of American Universities ("AAU") represents 62 public and private major research universities. AAU assists its members in developing national policy positions on issues relating to academic research and graduate and professional education. In addition, AAU provides members with a forum for discussing other institutional issues, such as undergraduate education.

Amicus, the Association of Jesuit Colleges and Universities ("AJCU") is a voluntary federation of the 28

Jesuit institutions of higher education in the United States. Formed in 1970, AJCU seeks to: improve the educational effectiveness of the institutions; articulate the mission and characteristics of Jesuit higher education and implement them in policy and practice; collaborate with national and international organizations; provide an educational forum for the exchange of experiences; and help members participate in federal and other national programs.

Amicus, the National Association of Independent Colleges and Universities ("NAICU") represents private colleges and universities on public policy issues before the federal government. Founded in 1976, NAICU serves its 900 members by promoting public policies that will assure all students the widest possible choice of institutions and programs; defending institutional integrity, freedom, and diversity; and supporting fiscal and tax policies that provide maximum encouragement for charitable giving to colleges and universities.

Amicus, the National Association of Independent Schools ("NAIS") is a voluntary membership organization that represents over 1,100 independent pre-collegiate schools nationwide. NAIS strives to provide its schools with appropriate principles of good practice, promoting high standards of academic excellence, affordable access to independent education, and diversified school communities. NAIS initiatives reflect areas of national concern, particularly when they involve the consequences of member schools accepting federal funds.

Amicus, the National Association of State Universities and Land-Grant Colleges ("NASULGC"), founded in 1887, is the nation's oldest higher education association. Representing more than 200 institutions – including public universities, land-grant institutions, and many of the nation's public university systems – NASULGC works to support the contributions that state and land-grant

universities make through teaching, research, and public service.

Founded in 1940, *amicus* National School Boards Association ("NSBA") is a not for profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members. These board members govern 14,772 local school districts that serve more than 46.5 million public school students – approximately 90 percent of all elementary and secondary school students in the nation.

SUMMARY OF ARGUMENT

Permitting individuals to sue under 42 U.S.C. § 1983 ("§ 1983") for violations of the Family Educational Rights and Privacy Act of 1974 ("FERPA" or "the Act") would create results Congress never intended and further complicate an already highly complex statute. Enacted in 1974, FERPA requires educational institutions and agencies receiving federal funds to comply with regulations that seek to safeguard the privacy of student educational records and insure that both parents and students[2] have access to those records in order to verify their accuracy. *See* 20 U.S.C. § 1232(g). After the adoption of several amendments and the issuance of numerous regulations and administrative interpretations, FERPA now influences most aspects of institutional life. *See, e.g.*, Leroy S. Rooker, Family

[2] FERPA defines "parent" broadly to include a natural parent, guardian, or person acting as a parent. 34 C.F.R. § 99.3. When a student becomes a legal adult, the consent required of a parent to access the student's education records transfers to the student herself. *Id.* at § 99.5. For simplicity, the term "parent" in this brief includes both parents under the definition in § 99.3, as well as students who have attained the age of eighteen.

Educational Rights and Privacy (FERPA), in *The Family Educational Rights and Privacy Act: A Legal Compendium* 515-16 (Steven J. McDonald ed., 1999) ("*FERPA Compendium*") (publication available from the National Association of College and University Attorneys) ("FERPA applies to all schools that receive funding under most programs administered by the Secretary of Education (section 99.1). At the post secondary level, virtually all private and privately owned religious schools receive applicable funding through the student financial aid programs of the Department. Any institution receiving such funding must comply with FERPA.").

With its broad impact on the educational institutions of the nation and its inherent conflicting interests, FERPA requires careful and well-informed consistency in the enforcement of its terms. Congress specifically structured the enforcement mechanisms in the Act to establish that level of administrative consistency by directing the Department of Education to establish a single, central, administrative office, the Family Policy Compliance Office (the "FPCO" or the "Office"), for the purpose of reviewing allegations of FERPA violations, identifying problems for institutions, and helping those institutions come into compliance.

With impressive unanimity, every court to consider the issue has held that FERPA does not provide a private right of action. *See, e.g., Tarka* v. *Franklin*, 891 F.2d 102, 104 (5th Cir. 1989); *Fay* v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986).

The opinion of the Supreme Court of Washington, on appeal to this Court, acknowledged this point, but held that "the FERPA provision at issue here gives rise to a federal right enforceable under section 1983." *Doe* v. *Gonzaga Univ.*, 24 P.3d 390, 400 (Wash. 2001) ("*Gonzaga*"). This holding stems from an incomplete understanding of this Court's most recent precedent on the question of whether a

federal statute creates a right that may be the basis for a lawsuit brought under § 1983. Additionally, the decision in *Gonzaga* failed to consider the very significant disruption of the now well-established federal regulation of education records that must follow from empowering individuals to bring private challenges through the agency of § 1983 lawsuits. Because this result is one that Congress plainly did not intend, the decision of the Supreme Court of Washington should be reversed.

I. FERPA'S ELABORATE REGULATORY SCHEME INCORPORATES DETAILED REQUIREMENTS AFFECTING VIRTUALLY ALL ASPECTS OF THE OPERATION OF EDUCATIONAL INSTITUTIONS AT EVERY LEVEL.

FERPA applies to every institution that accepts funds from the United States Department of Education, as most educational institutions do. It applies to every "education record," and almost every item of information recorded in writing or otherwise in the possession of an educational institution is an "education record." FERPA conditions the receipt of federal education funding on adoption of not one but three requirements regarding education records. Not only must every recipient institution maintain the confidentiality of every education record, 20 U.S.C. §§ 1232g(a)(1)(A), (b)(1), it must also have in place policies or practices which afford parents access to education records, as well as an opportunity to challenge and correct them, *id.* at § 1232g(a)(2). In addition, educational institutions must "effectively inform[]" parents and students of their access and disclosure policies established by FERPA. *Id.* at § 1232g(e).

A. FERPA Reaches Every Level Of Education In The United States.

Whenever an institution accepts a dollar of federal education funding, FERPA follows. *See* 20 U.S.C. § 1232g(a)(1)(A) ("No funds shall be made available under any applicable program . . ."). Because federal funding for programs supporting education is broadly available, most institutions at every level of the educational process must comply with FERPA. Consideration of only a few of the many pertinent programs demonstrates that some form of federal funding for educational programs is received by public and private institutions at every level of the educational system. The Individuals With Disabilities Education Act, 20 U.S.C. § 1400 et seq., and Title I, 20 U.S.C. § 6301 et seq., provide support for public and private schools from kindergartens through high school. In the case of post-secondary education, FERPA's mandates follow such nearly ubiquitous federal financial aid programs as the Pell Grant, 20 U.S.C. § 1070, and Guaranteed Student Loan, 20 U.S.C. § 1071. As a practical matter, therefore, FERPA's conditions on receipt of federal funding control the maintenance and administration of education records in virtually all American educational institutions.

B. The Statutory Definition Of "Education Record" Incorporates Virtually All Documents Containing Personally Identifiable Information.

FERPA's reach extends to all recorded information "maintained by an educational agency or institution" which contains personally identifiable information "directly related to a student." 20 U.S.C. § 1232g(a)(4)(A). The breadth of this definition means that FERPA sweeps up not just transcripts and evaluations, but also any other recorded information relating to the student in an identifiable way contained in an educational institution's files. Moreover, the

definition covers information recorded on any form of storage media from paper to a computer's hard drive. *See* 34 C.F.R. § 99.3.

Because the definition is locational, if the record is "maintained by an educational agency," it does not matter who wrote it. Thus, student employment records, computer usage records, and photo files that contain information about any identifiable student of the institution are "education records." *See, e.g., Belanger* v. *Nashua, N.H. Sch. Dist.*, 856 F. Supp. 40, 50 (D.N.H. 1994) (juvenile court records kept in school attorney's office and used for school purposes are maintained by educational agency). A parent's letter to a teacher objecting to inclusion of certain matters in the curriculum offered to her child's class was held to be an education record and therefore, beyond the reach of the press when the parent ran for the school board. *Warner* v. *St. Bernard Parish Sch. Bd.*, 99 F. Supp. 2d 748, 753 (E.D. La. 2000). *But see Lawson* v. *Edwardsburg Public Sch.*, No. 1:90-CV-68, 359811, at *1 (W.D. Mich. Nov. 14, 1990) (release of fact that former student had sued school not a violation of FERPA because the information released did not pertain to plaintiff's attendance at school).

The necessary consequence of the broad acceptance of federal education funds by institutions of all levels combined with a statutory definition that covers almost any form of recorded information concerning students maintained by an educational institution is that there is a federal record keeping policy which affects almost all the educational institutions in the United States. Accordingly, the Washington Supreme Court's general declaration that "FERPA does create individual rights privately enforceable under section 1983" can only be understood to imply judicial supervision of the entire scope of the federally regulated educational record system. *Gonzaga*, 143 P.3d at 401.

C. FERPA's Three Primary Conditions On Funding Involve It In All Aspects Of Educational Programs.

Taken together, FERPA's three primary conditions on education funding significantly affect numerous interactions between educational institutions and their students. FERPA requires recipients to have in place policies permitting parents and emancipated students to review records, to control release of information in records, and to seek correction of the contents of records. Although FERPA is denominated a record-keeping policy, a review of the cases and controversies that have arisen under FERPA makes clear that the statute penetrates far more deeply into educational activities. The facts in *Owasso Independent School District No. I-011* v. *Falvo*, 233 F.3d 1203 (10th Cir. 2000), *rev'd*, No. 00-1073 (S. Ct. Feb. 19, 2002), exemplify how control over access to information can control instruction in the classroom. There, the United States Court of Appeals for the Tenth Circuit upheld a parent's objection that use of the teaching device of having students grade each others work violates FERPA's prohibition against unauthorized release of an education record (the grade). *Id.* at 1219. But for this Court's reversal, the instructional technique would have been judged, not on the basis of its efficacy as a teaching tool, but rather on the basis of an interpretation of a federal record-keeping policy.

1. Confidentiality

A succession of enactments followed by administrative and judicial interpretation followed by corrective statutory amendments has been required to arrive at a fairly broadly accepted view of FERPA's application to the generality of recurring record keeping issues. While the original drafters of FERPA almost certainly did not foresee the possibility that institutions would respond to requests for information on student misconduct by pointing to FERPA,

FPCO's interpretations and judicial decisions have upheld that use of the statute. In the most dramatic of the confrontations between the public press and FERPA, a district court enjoined FPCO from asserting that FERPA prohibited the release of police logs containing personally identifiable information concerning criminal conduct by students. *Student Press Law Ctr.* v. *Alexander*, 778 F. Supp. 1227 (D.D.C. 1991). Congress responded to the uproar caused by the successful use of FERPA to limit access to conduct records by amending the statute to remove police records from the definition of education records. Pub.L. 102-325, Title XV, § 1555(a), July 23, 1992, 106 Stat. 840.

The more predictable tension between parental desire for confidentiality of a record perceived to be disadvantageous and a school's desire to give access to the record to those involved in the education of the student in question provokes a continuing need for interpretation. The resulting dilemmas institutions bring to FPCO for advice reveal a series of bona fide difficulties of interpretation far better suited to the advisory process provided by FERPA than to lawsuits by individuals.

2. Parental Access

The condition that a policy be in place permitting parents and emancipated students to access any personally identifiable information concerning a student is FERPA's most invasive mandate and has generated the greatest amount of litigation and administrative inquiry. One contentious issue involves the definition, for purposes of access, of the terms "parent" and "student." The elaboration of these definitions has been an evolutionary process involving regulations and interpretations by the FPCO, with an outcome that ultimately achieved general acceptance. An affirmance of the Washington Supreme Court's unlimited proposition that § 1983 makes private litigation available on

this issue will likely result in regional definitions of "parent" and "student" at variance with those currently in place.

3. Challenge and Correction

FERPA's condition requiring recipients to adopt a policy affording parents and emancipated students the opportunity to challenge the accuracy of the student's education records presents another example of the tightrope walked in the drafting of the statute. One of Senator Buckley's original objectives in proposing remedial legislation was to create a means by which a parent could point out inaccuracies and out-of-date material in a child's records. 120 Cong. Rec. 14579 (1974) (statement of Sen. Buckley) ("When parents and students are not allowed to inspect school records and make corrections, numerous erroneous and harmful material [sic] can creep into the records."). At the same time, the risk of creating a wholly unacceptable vehicle through which students could litigate grades assigned in class was apparent to Congress. 120 Cong. Rec. 36537 (1974). The solution to this dilemma was found in the use of wording which distinguishes the requirement of a process to challenge the content of a record from a right to have the record corrected. *See* 20 U.S.C. § 1232g(a)(2). The process for making a challenge is provided, but the educational institution has full discretion to resist the desired change, and if it does, FERPA requires only that the institution include the parents' rebuttal in the student's education record.

In light of the entirely administrative nature of the remedy Congress provided in § 1232g(a)(2), an ill-defined statement that "FERPA does create individual rights privately enforceable under section 1983," *Gonzaga*, 143 P.3d at 401, is a matter of great concern to the country's educational institutions. Undoubtedly, a plaintiff will seek to persuade the courts that, under a *Wilder* analysis, an opportunity to challenge a record is a dead letter unless there

is a judicially enforceable right to correct the record. Implying such a right will allow precisely what Congress determined should not be a remedy for FERPA violations. *See* 120 Cong. Rec. 14,587 (1974) (Sen. Ervin) ("The penalties [sic] for noncompliance with this act would be a loss of the Federal funds that had been made available to the school.").

D. An Unintended Consequence Of FERPA's Imposition of Conditions On Funding Has Been To Involve Educational Institutions In Challenges By Interests Desiring to Obtain Access To Information In Education Records.

One of the primary effects of the passage of FERPA was to make the country's educational institutions unwilling stakeholders in a struggle between Congress and the FPCO, on the one hand, and, on the other, those interests whose access to information in education records was cut off by policies adopted in order to conform to FERPA's conditions on funding. In that capacity, educational institutions found themselves facing contradictory and frustrating directives from judicial bodies, each of which was possessed of the authority to compel compliance with its orders. *See, e.g.*, Dixie Snow Huefner & Lynn M. Daggett, *Commentary: FERPA Update: Balancing Access to and Privacy of Student Records*, 152 Ed. Law Rep. 469, 491 (2001) ("FERPA continues to contain numerous internal and external ambiguities and conflicts, and it presents significant and often unclear burdens to schools").

The most dramatic example of the dilemma facing educational institutions when different courts reach diametrically opposite conclusions as to the proper interpretation of a law involves the efforts of student newspaper editors to obtain information concerning criminal activities contained in campus police logs and similar records. In litigation which produced rulings from the

Supreme Court of the State of Ohio as well as from the Federal District Court in Ohio, student editors sought to obtain disciplinary records from campus officials. In the first stage of the litigation, the Supreme Court of Ohio ruled that "university disciplinary records are not 'education records' under . . . FERPA." *State ex rel The Miami Student* v. *Miami Univ.*, 680 N.E.2d 956, 958 (Ohio 1997). In accordance with this conclusion, the Ohio Supreme Court directed the university to make records of student disciplinary records available to the student newspaper. Faced with a contrary ruling from the United States Department of Education, the university applied to this Court for a writ of certiorari, which was denied. *See Miami Univ.* v. *The Miami Student*, 522 U.S. 1022 (1997). By this point, the controversy had been expanded to include a national newspaper, which became the primary party seeking enforcement of the Ohio Supreme Court's order. The Ohio State University also became embroiled in the controversy. To vindicate its interpretation of FERPA, the United States Department of Education then commenced an action in the United States District Court for the Southern District of Ohio, which enjoined the defendant universities from releasing student disciplinary records. *United States* v. *The Miami Univ.*, 91 F. Supp. 2d 1132 (S.D. Ohio 2000).

In an earlier phase of the newspapers' quest for information about conduct on campus, the Student Press Law Center brought suit in federal district court to enjoin the Department of Education from applying FERPA so as to prevent educational institutions from releasing personally identifiable information about students contained in the records of campus law enforcement agencies. *Student Press Law Center* v. *Alexander*, 778 F. Supp. 1227 (D.D.C. 1991). In that case, the court undertook to interpret FERPA on its own, rather than await passage of pending amendatory legislation exempting the records of campus law enforcement agencies from the coverage of FERPA. After

applying a balancing test weighing First Amendment rights more heavily than the confidentiality endorsed by FERPA, the district court issued the requested injunction. *Alexander*, 778 F. Supp. at 1234.

A somewhat analogous issue has arisen in connection with press interest in disputes between educational institutions and students having rights under FERPA. The issue implicating compliance with FERPA arises when a parent or student referred to in an education record makes public complaints about the educational institution holding the record and a reporter approaches the institution for comment. Initially by FPCO interpretation, and subsequently by amendment to FERPA, an exception to the prohibition on non-permissive release of education records was created in instances of implied waiver; that is, when the subject of the record is deemed to have waived confidentiality by taking an adversarial position against the educational institution. *See* Letter from the FPCO to Dr. Daniel Nathans, Interim President, Johns Hopkins University (Feb. 19, 1997), *FERPA Compendium*, at 206. Not surprisingly, the breadth of this implied waiver has been tested in complaints brought to FPCO. *See, e.g.*, Letter from FPCO to Dr. Hoke Smith, President, Towson State University (June 22, 1998), *FERPA Compendium*, at 207 (implied waiver not present when release of information is to one not in a special relationship with the university and litigation not yet commenced by student).

These cases illustrate how FERPA litigation already creates dilemmas for educational institutions. Expanding the role of litigation by affirming the jurisdiction of the courts to hear private rights of action under § 1983 for alleged violations of FERPA will further distract educational institutions from the performance of their important societal mission. Moreover, private litigants may erode the coherence of the national scheme of interpretation and

enforcement that Congress codified in the language of the statute.

E. The Rapid Evolution Of Information Processing Technology And The Relative Age Of FERPA Ensure A Constant Need For New Interpretation.

Most of FERPA's statutory language was written in 1974, long before computers and information technology became the mainstay of academic record keeping. Senator Buckley and his colleagues had no reason to expect that so-called "distance education" might provide the sole contact between certain students and the institutions in whose programs they enroll or that institutions might want to make grades and evaluations available via a computer link. Along with those technological advances implicating "education records" goes the already common practice of using computer links to administer standardized testing and file applications for admission. In the midst of the rapid pace of these developments, the need to bring FERPA up to date presents a daunting challenge to educational institutions seeking to integrate new technologies and conditions on the receipt of federal funding. *Cf.* Privacy and the Handling of Student Information in the Electronic Networked Environment of Colleges and Universities, CAUSE Whitepaper (1997), *FERPA Compendium*, at 323.

With what we know today, it seems obvious that the development of a "Student Loan Clearinghouse" will require extrapolation from the existing language of FERPA to determine whether the release of student records to a computer-based service company is permissible. *See* Letter from the FPCO to Daniel R. Boehmer, National Student Loan Marketing Association (Apr. 19, 1993), *FERPA Compendium*, at 221. Nor does the precise wording of FERPA enable an institution to determine whether it is in compliance with the statute if it acts upon a student's request

for the issuance of a transcript, when that request is received over a computer link. *See* Letter from the FPCO to Dr. David S. Yeh, Cornell University (June 30, 1994), *FERPA Compendium*, at 191.

The importance of this developmental process to the question before the Court lies in the success of the centralized interpretation and enforcement which Congress crafted. Placing the interpretation of FERPA in the hands of trial courts of the state and federal systems risks unfortunate consequences for the evolution of the role of important new information-sharing technologies in educational record-keeping. Although each judge confronted with a request to prohibit institutions from using a new technique of information storage or transmission can be expected to use his or her best judgment, there is little hope that the eventual outcome will be a unified and consistent national approach.

F. The Wording Chosen By Congress To Express The Conditions Which It Placed Upon The Receipt Of Federal Funding By Educational Institutions Takes Into Account The Often Ambiguous Nature Of Educational Records And Their Use In Schools And Colleges.

FERPA imposes no sanction for a single failure to provide access, maintain confidentiality, or hear an argument in favor of correction. *See Gundlach* v. *Reinstein*, 924 F. Supp. 684, 692 (E.D. Pa. 1996) ("[W]e glean no unambiguous intention on the part of the Congress to permit the invocation of § 1983 to redress an individual release of records allegedly covered by FERPA."). Rather, before commencing any enforcement action, FERPA requires the Department of Education to find that a pattern of proscribed action has been identified and an opportunity to cure has lapsed without compliance.

> The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken *only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.*

20 U.S.C. § 1232g(f) (emphasis added).

FERPA specifies a violation as: (1) having "a policy of denying" parents access to education records, *id.* at § 1232g(a)(1)(A); (2) failing to provide "an opportunity for a hearing . . . to challenge the content" of education records, *id.* at § 1232g(a)(2); (3) having "a policy or practice of permitting the release of education records . . . without the written consent" of the student or parents involved, *id.* at § 1232g(b)(1); and (4) failing to "effectively inform[]" parents and students of their ability to access records and prevent their release, *id.* at § 1232g(e).

To enforce these standards, FERPA provides that "[t]he Secretary [of the Department of Education] shall establish or designate an office and review board" for the purpose of investigating complaints "concerning alleged violations" of the statute. 20 U.S.C. § 1232g(g). The administrative regulations implementing FERPA establish the FPCO for that purpose. *See* 34 C.F.R. § 99.60(b)(1). The regulations create a process for aggrieved individuals to communicate with FPCO concerning an institution's alleged failure to comply with FERPA. *See id.* (designating FPCO to "[i]nvestigate, process, and review complaints and violations" under FERPA). The regulations empower FPCO to require institutions to submit reports with "information necessary to resolve complaints" under the Act. *Id.* at § 99.62. Complaints may be filed with FPCO by parents or

eligible students, *id.* at § 99.63, and "must contain specific allegations of fact giving reasonable cause to believe that a violation" of FERPA has occurred, *id.* at § 99.64(a). FPCO investigates complaints to determine whether institutions or agencies have failed to comply with FERPA. *Id.* at § 99.64(b).

If FPCO decides to initiate an investigation regarding a complaint, it must inform the institution involved of the substance of the alleged violation and ask the institution to submit a written response to the complaint. 34 C.F.R. § 99.65. If the FPCO finds that the institution has failed to comply with the FERPA's requirements, the FPCO is obliged to inform the institution of the specific steps it must take to attain compliance and to provide "a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily." 34 C.F.R. § 99.66(c). Only if the institution does not comply within that reasonable amount of time may the Department of Education terminate the institution's eligibility for federal funding or take other enforcement action. 20 U.S.C. § 1232g(f) (stating that "action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determine that compliance cannot be secured by voluntary means"); 34 C.F.R. § 99.67.

The regulatory scheme places two fundamental constraints upon the imposition of sanctions for violations of FERPA. First, the secretary may not commence administrative action unless an institution has violated a policy or practice of violating the access or disclosure standards. The terms "policy" and "practice" demonstrate that more than one disclosure or access infraction is necessary for there to be a violation of FERPA. Because FPCO is authorized to act upon proof of a "violation" of FERPA, read together, the statute and the regulations indicate that institutions will not be sanctioned for a single

instance of noncompliance. Second, the Department of Education may not bring an action to terminate federal financial assistance unless it has first afforded an institution an opportunity to come into compliance and then determined that the institution's compliance cannot be secured through voluntary means. 20 U.S.C. § 1232g(f); 34 C.F.R. § 99.67.

A court should not simply disregard the strongly deliberative nature of this process, as did the Supreme Court of Washington, particularly not when Congress constructed that process over time through a series of legislative amendments. It is not too much to say that Congress has carefully crafted a means of letting the punishment fit the crime. Because of the range of institutions covered by FERPA's mandates from the most sophisticated universities to tiny rural school districts, Congress required that termination will only be imposed when there is a finding that the mandates of FERPA are understood *and* noncompliance is deliberate. In sum, recognizing that the ambiguities arising from countervailing interests would make compliance difficult, Congress crafted a remedial scheme characterized by administrative forbearance. One court to consider this remedial scheme has concluded:

> Against this background, it is clear that FERPA was adopted to address systematic, not individual, violations of students' privacy and confidentiality rights through unauthorized releases of sensitive educational records. The underlying purpose of FERPA was not to grant individual students a right to privacy or access to educational records, but to stem the growing policy of many institutions to carelessly release student records.

Smith v. *Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985); *see also Jensen* v. *Reeves*, 45 F. Supp. 2d 1265,

1276 (D. Utah 1999) ("FERPA was adopted to address systematic, not individual, violations of students' privacy by unauthorized releases of sensitive information in their educational records.").

The importation of a private right of action stands that scheme on its head. As can be seen from the decision below, a single violation can produce a reflexive result. In the instant case, the Washington court did not find that the institution understood that FERPA's limitations supersede the state requirements of a candid assessment of the morals of a candidate for licensure; nor did it even consider an inquiry into whether the institution would have voluntarily undertaken to adjust its actions so as to comply with FERPA.

The argument that the starkness of the facts found by the jury in *Gonzaga* justifies a § 1983 remedy ignores the care Congress took to avoid that result. Senator Buckley described far more harmful cases in his arguments in favor of the original bill, 120 Cong. Rec. 14581-82 (1974) (Sen. Buckley) (describing program identifying eighth-grade children as potential drug abusers), yet the Congressional debate was equally forceful in its understanding that the remedy for violations of the statute would be a loss of federal funding. 120 Cong. Rec. 14,587 (1974) (Sen. Ervin) ("The penalties [sic] for noncompliance with this act would be a loss of the Federal funds that had been made available to the school."). When Senator Ervin asserted that the penalty for noncompliance was a loss of federal funds, omitting any mention of a private right of action, Senator Buckley, with time to respond, did not attempt to suggest that a private right of action would also be available under the statute. The courts which have considered the question found no legislative intent to create a private right of action. *See, e.g.*, *Tarka*, 891 F.2d at 104; *Fay*, 802 F.2d at 33.

Shortly after FERPA's original enactment, Congress clarified its intent that enforcement of the statute should be

centralized in a national office. *See* Pub.L. 93-568, § 2(a)(7), (10)(B) (adding language, "Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department [of Education]"). By doing so, Congress specifically prohibited regional offices of the Department of Education from issuing interpretations or enforcing the Statute. Empowering state trial courts and federal district courts to play these roles through recognition of a private right of action under § 1983 vitiates that policy and the system established to institute it.

Congressional silence militates against the extension of § 1983 jurisdiction to FERPA for another reason. If Congress intended for FERPA to make the states liable for a new federal tort in the nature of maladministration of education records, it said nothing about that intention during the many pages of the Congressional Record devoted to FERPA's gestation. Under controlling jurisprudence, which the Supreme Court of Washington might have considered had Gonzaga University been a public institution, Congressional silence concerning the imposition of a significant burden as a condition of receipt of federal funds is sufficient to defeat any implication of intent to create a right of action imposing such an obligation. Under this "contract" analysis, Congress is obliged to express its intent quite clearly when placing restrictions on federal financial assistance. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 24 (1981) ("Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds."). Neither the language of FERPA, its legislative history (which is to the contrary), nor the regulations express Congress's intent to create a federal right actionable under § 1983. *Cf. Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, *supra*, slip op. at 5-6 ("[The] interpretation [of the Court of Appeals in *Falvo*] would effect a drastic alteration of the

existing allocation of responsibilities between States and the National Government in the operation of the Nation's schools. We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation.").

II. THE ANALYSIS ADOPTED BY THE WASHINGTON SUPREME COURT RISKS EXTENDING § 1983 JURISDICTION TO NUMEROUS OTHER FEDERAL FUNDING STATUTES AFFECTING EDUCATIONAL INSTITUTIONS.

Any consideration of the availability of § 1983 actions to enforce private "rights" under FERPA should take cognizance of the impact on educational institutions of applications for the same jurisdiction to enforce "rights" arising under other education funding statutes. In addition to FERPA, educational institutions must comply with federal statutes governing information reporting practices, crime prevention, and drug and alcohol abuse. Under the generalized rationale of the opinion below, many of these statutes might also give rise to an enforceable federal "right" that would expose institutions to private liability they could not possibly have foreseen. For example, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act conditions the receipt of federal funding on compliance with a complex regimen requiring annual reporting of crime statistics, warnings following incidents of crime on and near institutional campuses, and adoption of policies regulating institutional reaction to criminal acts on campus. *See* 20 U.S.C. § 1092(f) (the "Clery Act"). More particularly, as a condition to receiving the same types of financial aid covered by FERPA, the Clery Act requires institutions to report, among other items, a statement of current security policies, a statement of programs designed to inform students and employees about crime, statistics

concerning the occurrence of crime on campus (enumerated by offense), separate statistics concerning the occurrence of hate crimes, and a statement of policy regarding the possession of alcohol. *Id.* at § 1092(f)(1)(A),(D),(F),(H). The Clery Act also requires institutions to maintain a daily log recording crimes reported to campus police, *id.* at § 1092(f)(4)(A), and to "make timely reports to the campus community on crimes considered to be a threat to other students and employees," *id.* at § 1092(f)(3). Like FERPA, the Clery Act attempts to regulate colleges and universities on a national scale and to achieve consistency in institutional practices concerning campus crime, its prevention, and reporting. Finally, the Clery Act provides its own enforcement mechanism through the imposition of a civil penalty by the Secretary of Education. *Id.* at § 1092(f)(13).

These parallels between the Clery Act and FERPA suggest that, under the rationale of the Washington Supreme Court, it would be difficult to distinguish the claim that court allowed to proceed based upon FERPA rights from a claim for similar jurisdiction to vindicate "rights" created by the Clery Act. For example, a student might rely on an affirmance on the same broad grounds relied upon below to contend that an institution's failure to disclose particular crimes as part of Clery Act reporting violated her federal "right" to accurate crime statistics. Indeed, precisely that sort of claim of noncompliance with the Clery Act has been asserted as the basis for a student's claim against a university, albeit not in the § 1983 context. *See, e.g.*, *Murrell* v. *Mount St. Clare Coll.*, No. 3:00-CV-90204, 2001 WL 16788766, at *7 (S.D. Iowa Sept. 10, 2001) (finding that college had a "duty," under the Clery Act, to report its crime statistics accurately, but finding that student's claim for negligent misrepresentation failed because student could not show that she relied on the college's misreported crime statistics in choosing to enroll).

Finding an enforceable federal right in the Clery Act would create the same problems for the country's educational institutions as would a similar finding under FERPA. Even more than FERPA, the Clery Act is an amalgam of interrelated and highly complex legislative funding conditions. Reflecting that fact, Congress chose not to include a private right of action, *see* 20 U.S.C. § 1092(f)(14)(A)(i) ("Nothing in this subsection may be construed to . . . create a cause of action against any institution of higher education or any employee of such an institution for any civil liability."), and wrote clear language into the Clery Act to create a national enforcement and interpretation scheme policed by the Secretary of Education, *id.* at § 1092(f)(11), (14) (vesting power in the Secretary to report noncomplying institutions to "the appropriate committees of Congress," and authorizing the Secretary to impose civil penalties for noncompliance). Subjecting institutions to private lawsuits would add an unforeseen consequence to their acceptance of federal funding, as well as bring federal courts into the business of policing compliance with a federal statute that Congress plainly intended to be enforced by administrative agencies.

The Clery Act is only the most obvious parallel to FERPA. Other similar statutes with which educational institutions must comply in order to receive federal funding include The Collegiate Initiative to Reduce Binge Drinking and Illegal Alcohol Consumption Act, 20 U.S.C. § 1011h, a statute regarding drug and alcohol prevention, 20 U.S.C. § 1011i, and The Drug Free Workplace Act, 41 U.S.C. § 702. In addition, institutions are required to publish information about their costs and the availability of federal financial assistance, 20 U.S.C. § 1092(a), and must provide exit counseling regarding every student's federal debt burden upon their graduation, 20 U.S.C. § 1092(b). All of these statutes, like FERPA, plainly benefit individual students (and, in some instances, parents) by creating system-wide

policies and procedures that maximize information available to them and attempt to create a safe educational environment.

What must be considered is whether the undoubted benefit to students, in general, should give rise to an entitlement to judicial intervention, when such individual interventions will have the effect of defeating the legislative purpose of uniform and unified enforcement. Congress has shown its understanding of the fact that there must be a balancing between the creation of a policy which benefits the population of students and the creation of a right which will necessarily put educational institutions at risk for expenditures of money, time and effort that they cannot afford to make. In essence, Congress has chosen the carrot and not the stick, having observed that the stick could too quickly place unwarranted and, perhaps ruinous, burdens on educational institutions. Finding § 1983 jurisdiction to enforce the "rights" in FERPA, the Clery Act, and the other federal funding legislation is to reverse the Congressional determination and add the stick - without concern for the ultimate consequences to either students in general or educational institutions. Without suggesting that the courts should venture into the realm of legislation, it can be asked whether requiring institutions to defend against private lawsuits for small, individual infractions of these statutes is an efficient or logical way to allocate America's educational resources. When it drafted these complicated regulatory regimes, Congress plainly thought it was not.

III. THE STATE COURT FAILED TO IDENTIFY A RIGHT THAT IS ACTIONABLE UNDER § 1983.

42 U.S.C. § 1983 provides, in pertinent part: "Every person who, under color of any statute . . . of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law." 42 U.S.C. § 1983. The Court has interpreted the phrase "and laws" to permit individuals to bring § 1983 actions for deprivations of federal statutory rights as well as deprivations of constitutional rights. *See Maine* v. *Thiboutot*, 448 U.S. 1, 4 (1980). "In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997). *See also Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990) ("Section 1983 speaks in terms of *rights*, privileges, or immunities, not violations of federal law.") (citations and internal quotation marks omitted). Accordingly, permitting a private right of action under § 1983 to enforce FERPA requires an antecedent finding that FERPA creates a right that is enforceable under § 1983.

A series of decisions of the Court established and elaborated the standard for determining whether a federal statute creates a right that is actionable under § 1983. In *Wilder*, the Court employed a three-part test. *See* 496 U.S. 498 (1990). The statutory provision must be intended to benefit the plaintiff; it must reflect a binding obligation on conduct rather than a mere congressional preference; and the right must not be so "vague and amorphous such that it is beyond the competence of the judiciary to enforce." *Id.* at 509 (internal quotation marks omitted). In *Suter* v. *Artist M*, 503 U.S. 347, 363 (1992), the Court indicated that courts must subject the language of a federal statute to "[c]areful examination" before concluding that it creates a right enforceable through § 1983. Based upon such an examination, *Suter* held that the Adoption Assistance and Child Welfare Act ("Adoption Act") did not confer "an enforceable private right on its beneficiaries" and therefore declined to allow an action under § 1983 to enforce the provisions of the Adoption Act. 503 U.S. at 364.

Blessing refined the approaches in *Wilder* and *Suter* by emphasizing the necessity of identifying a particular

actionable right. Specifically, in deciding whether Title IV-D of the Social Security Act could be enforced under § 1983, the Court criticized the court of appeals for adopting a "blanket approach." *Blessing*, 520 U.S. at 344. The court of appeals had reasoned that Title IV-D's language requiring states to make "reasonable efforts" was intended generally to operate for the benefit of the plaintiff class and ended the inquiry with that conclusion. Ruling that the court of appeals had erred in finding that Title IV-D of the Social Security Act generally creates rights enforceable under § 1983, the Court stated, "It is readily apparent that [in addition to the requirement of substantial compliance] many other provisions of that multifaceted statutory scheme do not fit our traditional three criteria for identifying statutory rights." *Id.* The Court rejected the generalized approach used by the court of appeals and stressed that identification of a particular right created within the overall statutory scheme was a prerequisite to resolving the question whether enforcement under § 1983 was appropriate. The Court also decided that it could not even address, much less resolve, that question because the record did not allow it to identify with sufficient clarity the rights on which the plaintiffs based their claim. *Id.* at 346. Accordingly, the Court remanded the case to the district court "in order to determine exactly what rights, considered in their most concrete, specific form, respondents are asserting." *Id.*

It is apparent that the Washington Supreme Court ignored the teaching of *Blessing*. Tellingly, it is not even clear from the court's opinion what federal right the court managed to locate in FERPA's vast regulatory scheme. In what could be characterized as the holding of the opinion, the court stated, "In the instant case, FERPA does create individual *rights* privately enforceable under section 1983." *Gonzaga*, 24 P.3d at 401 (emphasis added). However, the court never enumerated those "rights" or defined them individually. The court's use of the plural term "rights" is

particularly curious because, in the second part of its *Wilder* analysis, the court stated, "second, the *right* is not so 'vague and amorphous' that the court cannot enforce it." *Id.* (emphasis added). In addition, the court's choice of words at the commencement of its *Wilder* discussion suggests that it understood it was being asked to determine the existence of one right: "John Doe argues that Gonzaga violated FERPA by disclosing confidential information." *Id.*

The confusion of plural and singular right(s) makes it impossible to determine whether the Washington Supreme Court held that FERPA creates a right not to have one's education records improperly disclosed, or whether the court held, more broadly, that § 1983 is available to enforce any right created by FERPA. Under the discussion in *Blessing*, the distinction is critical. *Blessing*, 520 U.S. at 346. At the very least, this failure to articulate with specificity the "right" or "rights" to which the opinion below was addressed requires a remand for clarification.

The Washington court's failure to focus its inquiry is particularly inappropriate in the context of FERPA. The court had before it facts found by a jury that, as shown by the verdict on the common law counts, were actionable conduct under widely accepted and long established rules of law. It was not only impermissible but also dangerous for the Washington court to conclude that, because this actionable conduct was also a violation of FERPA, any violation of FERPA is generally actionable under § 1983.

The danger of so facile an interpretation is made all the greater because of the degree to which FERPA has come to permeate education in America, the dilemmas of interpretation the statute already poses for educational institutions at all levels, the precarious balance the law strikes between personal privacy and access to information, and the limited, phased remedy for violations so painstakingly crafted by Congress.

CONCLUSION

For the reasons set forth above, the decision of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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